Why Using the *Jaffee* Balancing Test Can Stabilize the Predictability of a Federal Mediation Privilege

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I. INTRODUCTION

One of the most uncertain areas of mediation law is the existence of a federal mediation privilege.[1] Even though most state legislatures have adopted some form of a mediation privilege, the federal courts have failed to mirror the states' movement towards uniformity. [2] This federal unpredictability undermines the ability of mediation to prosper as a successful alternative dispute method.[3]

The uncertainty regarding future protection of parties' statements contributes to this unpredictability. Parties cannot predict how their mediation communications will be protected at the federal level, regardless of whether or not their case begins at the state level. Without this assurance of protection, parties will almost certainly be less willing to candidly participate in settlement negotiations because they cannot be confident that their mediation communications cannot later be used against them.' [4] To correct this unpredictability and promote mediation instead of litigation, the federal courts must begin to uniformly recognize a federal mediation privilege.[5]

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[1] SARAH R. COLE, ET AL., 1 MEDIATION: LAW, POLICY AND PRACTICE §8.1 (Thomson Reuters 2014); Judy Shopp, *Mediation: Confidentiality and Privilege*, Pa. B. Ass'n Q. (July 2010).

[2] *E.g.,* COLE, *supra* note 1, at §8.18 ("For example, federal district courts in Georgia, California, and Pennsylvania have recognized a privilege...[t]he Fifth Circuit Court of Appeals has refused to do so. The Second, Fourth and Ninth Circuit Courts of Appeals have declined opportunities to decide the issue.").

[3] *E.g.,* Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 243 (2002).

[4] *Id.* at 243. *See also*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2011).

[5] *See generally* Deason, *supra* note 3 (strongly advocating for federal uniformity to promote predictability); Marcia S. Cohen, *The Mediation Privilege, Florida Bar Journal*, 87 APR FLA. B.J. 14 (April 2013) (articulating four main advantages of a mediation privilege; candor, fairness, privacy, and neutrality).

Legal scholars have debated the vehicle that federal courts should use to establish a consistent and predictable mediation privilege, to no avail.[6] The best solution is to look directly at the congressional intent accompanying the drafting and enactment of the flexible evidence rule governing federal privileges. In the Federal Rule of Evidence 501 ("Rule 501"),[7] Congress instructed courts to adapt to society's evolving interests in promoting confidentiality within certain relationships by interpreting Rule 501 "in light of reason and experience" when recognizing new privileges.[8] The rule's congressional intent lays a strong foundation in support of establishing a federal mediation privilege. Using this foundation, federal courts should then look to the Supreme Court's landmark decision regarding common law privileges under Rule 501, *Jaffee v. Redmond*.[9]

Federal courts should use their "reason and experience" to apply the balancing test established by the Supreme Court in *Jaffee v. Redmond* to recognize a federal common law mediation privilege because the interests promoted by a mediation privilege greatly outweigh the need for probative evidence.

Part II of this article reviews the evolution of the codification of the evidence rules, first by examining the decision to create codified evidence rules and then by exploring the specific congressional intent with drafting and enacting Rule 501. Part III outlines the four factors established by the Supreme Court in *Jaffee v. Redmond* and the weight given to each factor. Following this discussion of the Supreme Court's balancing test is an analysis of each factor's applicability to mediation and the corresponding interests served by the existence of a federal mediation privilege. Part IV highlights the need for a predictable federal mediation privilege by exploring the current inconsistencies among federal court approaches to a common law privilege, specifically within the context of labor disputes. Part V concludes with a proposal for establishing a federal common law mediation privilege.

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[6] Alan Kirtley, *Best of Both Worlds: Uniform Mediation Privilege Should Draw from Both Absolute and Qualified Approaches*, 5 NO. 2 DISP. RESOL. MAG. 5 (Winter, 1998).

[7] Fed. R. Evid. 501.

[8] Notes of Committee on the Judiciary, S. REP. No. 93–1277. This standard of "reason and experience" applies residually, when neither state law supplies the substantive rule of decision nor does a federal statute require the court to look elsewhere.

[9] Jaffee v. Redmond, 518 U.S. 1, 2 (1996).

II. DRAFTING AND ENACTING FEDERAL RULE OF EVIDENCE 501

Privileges proved to be the most controversial of the all the Federal Rules of Evidence.[10] An evidentiary privilege promotes the interest in confidentiality within a relationship, while the other evidence rules promote the interest in judicial truth-seeking.[11] A privilege directly contravenes the truth-seeking interest.[12] By blocking the admissibility of certain testimony, a privilege goes against the "fundamental maxim"[13] of the public's right to every other person's evidence.[14] This delicate balance of opposing interests required a unique approach to the application of Rule 501 that satisfied both the interest in promoting confidentiality in certain relationships as well as the judicial interest in truth-seeking.

The Supreme Court originally proposed nine specific privileges,[15] but Congress rejected the list in favor of a flexible rule that allowed courts to balance those competing interests and continue developing alongside an ever-changing society.[16] The 1975 Senate report accompanying the Rules indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship should be determined on a

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[10] Fed. R. Evid. 501. Rule 501 delayed the Rules' enactment for two years and half of all complaints Congress received were about privileges.

[11] CHRISTOPHER W. BEHAN, EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE 616-620 (2012).

[12] Congress preferred to "leave the door open to change." H.R. REP. No. 93-650 (House Committee on the Judiciary, 1973). In doing so, Congress did not intend to explicitly disapprove of those nine individual privileges, but rather intended for the courts to determine the merits of specific privileges. The common distinction between a privilege and the other evidence rules is that a privilege promotes some extrinsic interest, rather than the traditional judicial interests in admissibility. However, the better distinction is that a privilege exempts its holder from their general duty to give all the testimony they are capable of giving.

[13] United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2192 (3d ed. 1940)). *See also* United States v. Nixon, 418 U.S. 683, 709 (1974).

[14] The general view of disfavoring evidentiary privileges is supported by this interest in the equitable administration of justice through complete testimony.

[15] Notes of Committee on the Judiciary, *supra* note 8.

[16] Congress preferred to "leave the door open to change." H.R. REP. No. 93-650 (House Committee on the Judiciary, 1973). In doing so, Congress did not intend to explicitly disapprove of those nine individual privileges, but rather intended for the courts to determine the merits of specific privileges.

case-by-case basis."[17] Therefore, the Rule did not freeze the law pertaining to privileges, but instead directed the federal courts to "continue the evolutionary development of testimonial privileges."[18] Congress's intent is manifested by the final language in Rule 501, which states:

> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.[19]

The amount of judicial discretion that Congress afforded to the federal courts is qualified by the phrase "in the light of reason and experience."[20] Although somewhat ambiguous, it stresses the importance of flexibility among the courts. Congress found support for the idea that the rule must be flexible and capable of change as society evolved from the Supreme Court's oft-quoted phrase, "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."[21] As outlined below, the "varying conditions" reflect an evolving society and the continuously changing interests that accompany a privilege.[22]

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[17] Notes of Committee on the Judiciary, *supra* note 8, at 13.

[18] Trammel v. United States, 445 U.S. 40, 47 (1980). *See also* University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990).

[19] Fed. R. Evid. 501.

[20] *Id.* Saying that "privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the courts of the United States, in the light of reason and experience."

[21] Wolfe v. United States, 291 U. S. 7, 12 (1934) (quoting Funk v. United States, 290 U.S. 371, 383 (1933)). *See also* Hawkins v. United States, 358 U.S. 74, 79 (1958) (changes in privileges may be "dictated by reason and experience").

[22] Jaffee v. Redmond, 518 U.S. 1, 8 (1996).

III. THE FOUR-FACTORS FROM THE SUPREME COURT BALANCING TEST IN *JAFFEE V. REDMOND*

A. *The Paradox of the Supreme Court's Choice to Establish and Use a Balancing Test for Recognizing New Privileges*

The Supreme Court granted certiorari in *Jaffee v. Redmond* because the federal courts could not agree upon the psychotherapist privilege. The Court recognized the problem of unpredictability that would result if lower courts were permitted to use their own "reason and experience" to formulate different balancing tests for recognizing privileges. The courts would create different balancing tests with different factors, and the resulting recognized privileges would be just as different. Even in factually similar contexts, courts could potentially reach opposite decisions on whether to recognize a certain privilege.

The Supreme Court intended to promote the "fundamental maxim" associated with judicial truth-seeking and the right to every man's evidence by creating a burden that a privilege must overcome in order to be worthy of recognition.[23] The Court summarized this burden by instructing courts to recognize a privilege only if it "promotes sufficiently important interests to outweigh the need for probative evidence."[24] The Court then created a four-factored balancing test to determine whether the privilege overcomes this "burden."

Each factor in the *Jaffee* balancing test represents an interest that the privilege either promotes or inhibits. First, the privilege must be necessary to promote trust in a private and confidential relationship.[25] Second, in addition to promoting that private interest, the privilege must also serve a public interest.[26] These factors represent two different interests that are both classified under "sufficiently important interests" because they are both promoted by the recognition of the privilege. For this analysis, imagine the combination of these two factors creates the left side of a judicial scale. After using "reason and experience" to consider the weight of those two factors, courts must then consider the third factor.

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[23] Melanie Stephens Stone, Jaffee v. Redmond*: The Supreme Court Adopts a Federal Psychotherapist-Patient Privilege and Extends the Scope to Encompass Licensed Social Workers*, 48 MERCER L. REV. 1284, 1289 (1997).

[24] *Jaffee*, 518 U.S. 1 at 9.

[25] *Id.* at 10.

[26] *Id.* at 11.

The third factor represents the interest in complete and accurate probative evidence in judicial proceedings by requiring that the potential loss of evidence as a result of recognizing the privilege be no more than "modest."[27] For this analysis, imagine the third factor creates the right side of a judicial scale. The left and right sides of this judicial tipping scale fluctuate as societal interests evolve and as courts give different weight to each of the factors, depending upon the context. Courts must use their own "reason and experience" to determine whether the left side of the scales sufficiently outweighs the right side as to justify the recognition of the privilege.[28]

The final factor represents an interest unlike the first three—the interest in promoting predictability among the existing privileges at the state court level. Courts must determine whether denying the federal privilege would frustrate similar privileges that exist uniformly and consistently across the state level.

The following is an analysis of each of the four factors, first as originally established by the Supreme Court and then applied to the context of mediation to justify the recognition of a federal mediation privilege.

B. *First Factor on the Left Side of the Judicial Scale: Private Interests Promoted by the Proposed Federal Privilege*

The Supreme Court first turned to the private interests associated with recognizing a privilege by stating that the privilege must be "rooted in the imperative need for confidence and trust" in confidential relationships.[29] A privilege that is rooted in this need will assure parties that their statements are confidential; creating an environment of trust and confidence in the relationship's ability to be successful.

The private interests are those of the specific parties involved in the confidential relationship and the success of their relationship is directly affected by the existence of a privilege. Courts must analyze the relationship to determine whether it requires trust and confidence to be successful. If the proposed privilege sufficiently promotes an environment of trust in a private relationship, courts should give this factor significant weight in favor of recognizing the privilege.

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[27] *Id.* at 13.
[28] *Id.*
[29] *Id.* at 10.

1. *Private Interests Promoted by Recognizing the Proposed Psychotherapist-Patient Relationship in* Jaffee v. Redmond

In *Jaffee*, the Supreme Court analyzed the nature and context of the psychotherapist-patient relationship to determine whether private interests were promoted by the proposed privilege for such communications.[30] The Court reasoned that honest communications, which are fostered by an atmosphere of trust and the assurance of confidentiality, are necessary for the patient's proper diagnosis and treatment.[31] Both parties have private interests in the success of the relationship. The psychotherapist has an interest in making a correct diagnosis and in successfully treating the patient. The patient also has those interests in proper treatment, but has an additional interest in preventing any potentially embarrassing or personal information from becoming public after the session has ended.[32] These private interests are shared by all individuals in a psychotherapist-patient relationship.

Without this privilege, the success and purpose of the relationship would be undermined because of the lack of confidentiality. The patient may not communicate honestly with the psychotherapist due to the risk of embarrassing or personal information becoming public after the therapy session has ended. The patient may lie or omit essential information, which could cause the psychotherapist to unknowingly misdiagnose the patient. The psychotherapist is then at risk for potential malpractice or liability. These negative ripple effects of an improper diagnosis harm both parties. Courts should consider both the positive and negative effects of the privilege to give proper weight to the first factor.

2. *Similar Private Interests Promoted by Recognizing a Federal Mediation Privilege*

Parties to a mediation have a similar interest in confidentiality and legal scholars agree that confidentiality is essential to reaching settlements because

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[30] *Id.*

[31] *Id.* Within *Jaffee*, the success of the psychotherapist-patient relationship "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communication made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede disclosure of the confidential relationship necessary for successful treatment."

[32] *Id.*

trust between parties promotes full disclosures and candid negotiations. The disputing parties have a relationship with each other, and they each have a relationship with the mediator. All three of these interwoven relationships benefit from the existence of confidentiality within and after the mediation and the same reasoning applies to the relationships between mediation parties and their individual relationship with the mediator.[33] When disputing parties genuinely trust that the negotiations are confidential, an atmosphere of trust develops in the mediation.[34] This helps eliminate parties' fears that their statements will later be used against them as evidence, allowing them to freely participate in candid negotiations and make complete, honest disclosures.[35] With a promise of confidentiality, a party may be more willing to accept a different solution or make unfavorable concessions during a mediation session, even if they would not have done so publicly.

More support for the necessity of "trust and confidence" in mediation stems from the idea that mediation is often the parties' last opportunity to settle their dispute in a mutually beneficial way.[36] For example, imagine two parties who have spent significant time and money and have repeatedly failed to reach a settlement privately and without a mediator. The next phase for these parties is almost certainly formal litigation, which will cost more time and money, as well as add to the already overcrowded judicial docket. The parties' opportunity to achieve a solution that is mutually beneficial also diminishes if they are forced to proceed onto litigation. Mediation serves as a final, last chance attempt for the parties to settle their dispute outside of costly litigation. Instead of the mutual losses that are almost certain to result from litigation, the two parties have the assistance of a mediator to attempt again to achieve mutually beneficial solutions.[37] This common scenario shows why a federal

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[33] Deason, *supra* note 3, at 26 (arguing that the designation of the privilege holder is "more difficult than with privileges that protect confidential relationships with a trusted advisor" because of the "complex flow of communications between adversarial parties, and is distinguished by the participation of the mediator as a facilitator...").

[34] Legal scholars generally agree about the advantages of confidentiality in mediation. *See* COLE, *supra* note 1. *See, e.g.*, Karin S. Hobbs, *Mediation Confidentiality and Enforceable Settlements: Deal or No Deal?*, MEDIATE.COM: EVERYTHING MEDIATION (January 2007), http://www.mediate.com/articles/hobbsk1.cfm#.

[35] *See also Confidentiality in Federal Alternative Dispute Resolution Programs*, 65 Fed. Reg. 83,085 (Fed. Alt. Dispute Council Dec. 29, 2000) ("[G]uarantees of confidentiality allow parties to freely engage in candid, informal discussions of their interests in order to reach the best possible settlement of their claims. A promise of confidentiality allows parties to speak openly without fear that statements made during an ADR process will be used against them later.").

[36] *See generally* FISHER & URY, *supra* note 4.

[37] *Id.*

mediation privilege would promote the private interests in reaching a settlement.

The drafters of the Uniform Mediation Act reiterate the need for confidentiality. The Prefatory Note of the Uniform Mediation Act solidifies the connection between assured confidentiality and honest communications among mediation participants.[38] It argues that only when the parties believe that their mediation communications will not later hurt them in subsequent court proceedings, will they participate in those communications with complete candor and disclosure.[39]

Similar to the reasoning in *Jaffee*, strong support for the private interests promoted by the privilege can be found by reviewing the potential negative implications if the proposed privilege was denied. Without the assurance of mediation confidentiality, parties have no incentive or ability to form the necessary atmosphere of trust and confidence.[40] Parties may not fully disclose important information or may not negotiate honestly out of fear that their disclosures may be used as evidence against them in subsequent court proceedings. Any lack of honest participation derails a potential settlement because negotiations are futile when parties withhold essential information. Therefore, to promote the private interest in reaching a settlement, a mediation privilege is necessary. The first factor of the balancing test is firmly established.[41]

C. *Second Factor on the Left Side of the Judicial Scale: Public Interests Promoted by the Proposed Federal Privilege*

In addition to promoting a private interest, a privilege must also serve a public interest.[42] In *Jaffee*, the Supreme Court determined that the public also

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[38] *Uniform Mediation Act and Official Comments*, 2003 J. DISP. RES. 1, 7 (2003) ("[F]rank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.").

[39] *Id.*

[40] Deason, *supra* note 3, at 240 (explaining that parties' perception of confidentiality is "axiomatic" in the mediation process).

[41] *See e.g.*, American Journal of Mediation, *The Path Toward a Federal Mediation Privilege: Approaches Toward Creating Consistency for A Mediation Privilege in Federal Courts,* available at http://www.americanjournalofmediation.com/docs/THE%20PATH%20TOWARD%20A%20FEDERAL%20MEDIATION%20PRIVILEGE%20.%20.%20%20..pdf (last visited Nov. 28, 2016).

[42] Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

benefits from a successful psychotherapist-patient relationship.[43] The Seventh Circuit addressed the other federal decisions that had rejected the privilege, noting that they were more than five years old and that the "need and demand for counseling services has skyrocketed during the past several years."[44] The public certainly has an interest in the successful treatment of mental health disorders and associated issues.

The Supreme Court found support for the public interest in their previous opinions that addressed the spousal and attorney-client privilege.[45] The attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and administration of justice."[46] In a similar vein, the spousal privilege "furthers the important public interest in marital harmony."[47] Both privileges had been previously established using a similar balancing test, although they were in contexts different than the medical relationship in *Jaffee.*

The Supreme Court explained that the public interest served by the psychotherapist privilege was of great importance; the psychotherapist privilege promotes "appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[48] The second factor was firmly established, and the reasoning used by the court directly applies to a federal mediation privilege.

A recognized federal mediation privilege would promote public confidence in the success of mediation as an alternative dispute resolution method, which would then likely increase the voluntary use of mediation as a dispute resolution method. This positive public perception would also serve the public's interest in decreasing court dockets and the associated costs.[49] The UMA Prefatory Note articulates this argument by stating: "Public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes."[50]

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[43] *Id.* The Court noted that if no privilege existed for psychotherapist-patient communications, the public would be deterred from seeking treatment for mental illness.

[44] *Id.* at 9 (quoting Jaffee v. Redmond, 51 F.3d 1346, 1355-1356 (7th Cir. 1995).

[45] See e.g. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[46] *Id.*

[47] Trammel v. United States, 445 U.S. 40, 53 (1980*). See also* United States. v. Nixon, 418 U. S. 683, 705 (1974); Wolfle v. United States, 291 U. S. 7, 14 (1934).

[48] *Jaffee*, 518 U.S. 1 at 11.

[49] Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way*, 18 OHIO ST. J. ON DISPUTE RESOL. 93, 118-48 (2002).

[50] UNIF. MEDIATION ACT, prefatory note (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2003).

One of the UMA's primary purposes was to promote this public interest by encouraging a "full disclosure of facts to the mediator by all parties and helps bring a higher level of success and party satisfaction to all mediations. Achieving a higher level of success will promote greater community confidence in the mediation process which should result in more disputes being resolved by mediation." [51] Parties may also provide incomplete information during mediation if they believe that mediation is not to be taken seriously, which undermines the overall success of mediation as an alternative dispute resolution method.[52] Legal scholars agree that public support of the mediation process increases when parties are assured that their mediation statements will be protected and remain confidential.[53]

Without this positive public perception of the probabilities of successful mediation, parties may not use mediation to settle their disputes, leading to lengthy and expensive court dockets and slower judicial processes.[54] Without the assurance of confidentiality, parties may be hesitant to use mediation, and court dockets would thus not decrease because of the difficulty in encouraging settlements. [55] Instead, parties may turn to litigation or believe that any settlement achieved through mediation is non-binding. Both of these results negatively affect the courts' ability to enforce judgments, keep judicial costs low, and maintain their overall judicial integrity.[56] A mediation privilege is necessary to promote the public interest in the increased use of mediation and, therefore, the second factor is more than sufficiently established.

D. *Only Factor on the Right Side of the Judicial Scale: Loss of Evidence Due to the Proposed Federal Privilege Must Not Exceed "Modest"*

The first two factors represent the private and public interests promoted by recognizing the privilege. The third factor represents a conflicting interest that is inhibited by the privilege.[57] The judicial interest in truth-seeking is

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[51] *Id.*

[52] *See generally* FISHER & URY, *supra* note 4.

[53] *See* Deason, *supra* note 3, at 240.

[54] *Id.*; Eric Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J ON DISP. RESOL. 1, 2 (1986).

[55] *See* Deason, *supra* note 3, at 240; Green, *supra* note 54, at 2.

[56] Stuart M. Widman, *The Protections and Limits of Confidentiality in Mediation*, 24 ALTERNATIVES TO HIGH COST LITIG. 167, 170 (2006).

[57] Walter V. Stafford, *Evidentiary Privileges in the Federal Court*, 52 CAL L. REV. 3 (1964).

promoted instead by the denial of the privilege.[58] The third factor in the *Jaffee* balancing test promotes the earlier stated "fundamental maxim" by requiring that any loss of evidence as a result of the privilege be no more than "modest."[59] By weighing the third factor against the first two factors, federal courts can determine whether a privilege should be recognized from a policy standpoint before turning to the final *Jaffee* factor.

The Supreme Court recognized the general duty of every citizen to give all of the testimony they are capable of giving.[60] The majority further addressed the common law principles underlying the recognition of testimonial privileges by stating:

> For more than three centuries it has now been recognized as a fundamental maxim that the public...has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.[61]

The Court explicitly stated that the interest in judicial truth-seeking is assumed to exist through this general duty.[62] Therefore, any exception must be distinct and exceptional as to justify defying this interest.

Scalia's dissent in *Jaffee* vigorously advocates against the privilege because of resulting "occasional injustice."[63] He clarifies the third factor by explaining that the courts have a "duty to proceed cautiously when erecting barriers between us and the truth."[64] A privilege creates this "barrier" because it inhibits, to some extent, the judicial duty of accurate fact-finding.

Scalia acknowledges that the first two factors are easily met, and that the court avoids meeting the high standard for rules that are "in derogation of the search for truth."[65] Scalia then argues that stating those values do not answer

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[58] *Id.*

[59] Jaffee v. Redmond, 518 U.S. 1, 11 (1996).

[60] *Id.* at 9.

[61] United States. v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2192 (3d ed. 1940)). *See also* United States v. Nixon, 418 U.S. 683, 709 (1974).

[62] *Bryan*, 339 U.S. at 331.

[63] *Jaffee*, 518 U.S. at 18 (Scalia, J., dissenting).

[64] *Id.* at 21.

[65] *Id.* at 22 (quoting Nixon, 418 U.S. at 710).

the critical question at hand in the case, which is the question of whether those public and private interests are of such importance as to justify making the federal courts susceptible to occasional injustice.[66]

The importance that the court places on this interest is seen in another context by comparing the *Jaffee* decision to a later Supreme Court decision that resulted in the opposite outcome.[67] The context in which the Supreme Court denied the privilege is vastly different than in *Jaffee,* which demonstrates the heavy burden required to overcome the "fundamental maxim" of evidence admissibility.

In *University of Pennsylvania v. Equal Employment Opportunity Commission*, a university refused to disclose and submit tenure documents to the Equal Employment Opportunity Commission, claiming that the documents were privileged and confidential and, therefore, inadmissible. [68] These documents related to multiple accusations of sexual and racial discrimination against a tenured professor. [69] The Supreme Court disagreed with the university and used the four *Jaffee* factors to justify denying their proposed privilege.[70]

In the unanimous opinion, the Supreme Court reasoned that the need for valuable evidence in discrimination allegations outweighed the interests promoted by the privilege and that the "costs associated with racial and sexual discrimination in institutions of higher learning" outweighed confidentiality's "importan[ce] to the proper function of the peer review process."[71] This opinion shows the difference in weight given to the third factor, depending upon the specific claim or cause of action that the evidence is being offered to prove. The Court recognized the psychotherapist-patient privilege, [72] but denied a privilege for documents relevant to racial and sexual discrimination charges.[73] The Court used the *Jaffee* balancing test in both cases to come to different conclusions, and lower courts should follow this example and use the *Jaffee* balancing test to recognize a federal common law mediation privilege.

In the context of a mediation privilege, the loss of evidence as a result of a mediation privilege is likely to be no more than "modest."[74] The Supreme

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[66] *Id.*

[67] Univ. of Pa. v. Equal Emp't Opportunity Comm'n, 493 U.S. 182 (1990).

[68] *Id.* at 182.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 193.

[72] Jaffee v. Redmond, 518 U.S. 1, 2 (1996).

[73] *Univ. of Pa.*, 493 U.S. at 189.

[74] Folb v. Motion Picture Indus. Pension & Health Plans, 216 F.3d 1082, 1082 (9th Cir. 2000).

Court noted that any party's loss-of-evidence argument is somewhat weak because without the existence of a privilege, the evidence may have never existed at all.[75] In other words, information that is disclosed for the first time in a mediation may otherwise not have been disclosed at all.[76] It would seem that the court concluded that the burden of determining how to discover the information otherwise is not an unacceptable burden of production.

Some courts have speculated that a mediation privilege may permit disputing parties to "disobey court orders or otherwise violate ethical rules" without any risk of punishment.[77] Those courts concluded that the increased risk of mediator misconduct, attorney malpractice, or unauthorized practice of law outweighs the interests benefited by a mediation privilege.[78] Certainly, unpunished professional misconduct jeopardizes the integrity of mediation and the entire judicial system, and would also create a negative public perception of the seriousness and success abilities of mediation.

There are four general categories of situations in which a mediation privilege would likely be outweighed by the need for evidence: (1) for the use in criminal proceedings, (2) to prove coercion or fraud that led to the mediated settlement, (3) to establish the terms of an agreement, and (4) to impose sanctions or disciplinarily actions on counsel for their actions during the mediation.[79] These situations are addressed by the UMA and offer insight into potential exceptions that federal courts could enact for the common law mediation privilege. However, the UMA's privilege exceptions address these

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[75] *Univ. of Pa.*, 493 U.S. at 67.

[76] Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511, 514 (W.D. Pa. 2000).

[77] Nielsen-Allen v. Indus. Maint. Corp., No. Civ. 2001/70 FR, 2004 WL 502567, at *2 (D.V.I. Jan. 8, 2004) (Reasoning that "[a]pplying the cloak of mediation to the facts of this matter appears inequitable to [the defendant] who negotiated settlement of [this action] and applied confidentiality thereto for the express purpose of avoiding having such settlement amount established as a benchmark in future similar employment cases. Such result highlights the need for exceptions to mediation confidentiality." The court refused sanction counsel for an alleged wrongful disclosure of a settlement amount.). *But see* Reda v. Globalist Internet Technologies, Inc., No. G039232, 2008 WL 2656147, at *3-4 (Cal. 4th Dist. Ct. App. July 8, 2008) (excluded attorney testimony regarding the events of a mediation, reasoning that the statute did not contain explicit language permitting the testimony, and rejecting the argument that no purpose is served by a mediation privilege when the witness is lying about events that occurred during a mediation).

[78] *Reda*, 2008 WL 2656147, at *3. *But see* Wimsatt v. Superior Court, 152 Cal. App. 4th 137, 163 (Cal. 2d Dist. Ct. App. 2007) (refusing to recognize an exception for legal misconduct, observing that "when clients...participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel").

[79] *See generally* Widman, *supra* note 56.

fears by waiving the privilege in certain contexts.[80] For example, there is no privilege when certain evidence is otherwise indiscoverable and is essential to prevent a "manifest injustice."[81]

When balancing the third factor against the first two factors, federal courts should conclude that recognizing a mediation privilege is justified. The fourth factor in the *Jaffee* balancing test exists separately and forces courts to determine whether the interest in state and federal predictability will be inhibited if the federal privilege is denied.

E. *Final Factor Not Placed on the Judicial Scale: Frustration of State Uniformity if the Proposed Federal Privilege is Denied*

The first three *Jaffee* factors could exist, theoretically, regardless of whether the privilege was being considered at the state level or federal level because those three factors represent the *general* interests involved in recognizing a privilege. The fourth factor is specific to the existence of a federal privilege. It requires federal courts to establish that similar state privileges would not be frustrated by their refusal to recognize the proffered privilege.[82] The fourth factor promotes the interest in predictability both vertically and horizontally.

If a court determines that the right side of the scale outweighs the left, and therefore a privilege should not be recognized, the court must then proceed to account for the fourth factor and make an additional determination as to whether the privilege should still not be recognized. If a court determines that the left side of the scale outweighs the right and therefore a privilege should be recognized, there is no need to analyze the fourth factor because the court has already determined that there will be no denial of the federal privilege. For this reason, the fourth factor is not placed directly on the opposite scales, but is rather an additional interest that must be accounted for after a court decides that the right side outweighs the left. This added final inquiry emphasizes the

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[80] UNIF. MEDIATION ACT, *supra* note 50, at §6(a)(1)-(7). *See, e.g.*, Ohio R.C. § 2710.05(B)(1). Section language states: "There is no privilege under section 2710.03 of the Revised Code if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that the disclosure is necessary in the particular case to prevent a manifest injustice, and that the mediation communication is sought or offered in either of the following: (1) A court proceeding involving a misdemeanor..."

[81] UNIF. MEDIATION ACT, *supra* note 50, at §6(a)(1)-(7).

[82] Jaffee v. Redmond, 518 U.S. 1, 8 (1996).

Court's original goal to promote predictability, both horizontally and vertically.

In *Jaffee*, the Supreme Court stated that "[b]ecause state legislatures are fully aware of the need to protect the integrity of the fact-finding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." The court looks to the "reason and experience" of the States for support when recognizing the privilege. If a consensus exists among the state courts, it should be regarded as strong support for the federal courts to reach the same consensus.

Further, "[i]n addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any state's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications."[83] The Supreme Court emphasized the importance of predictability across both court systems. In the lower court, the Seventh Circuit observed that all fifty states had already recognized some form of the psychotherapist-patient privilege.[84] The federal court's refusal to recognize a federal privilege frustrated the purpose and functionality of the existing state uniformity.

For example, imagine one district court in State A created a two-part balancing test and subsequently decided to recognize a privilege for communications made inside a company board meeting, but another district court in State A created a five-part balancing test and subsequently decided not to recognize a privilege for company board meeting communications. Then, imagine that several board members in State A decided to sue the rest of the board members for defamation. If half of the board members were from one district in State A and the other half were from the other district, there would undoubtedly be confusion throughout the litigation as to whether the communications are privileged. This would frustrate those hypothetical proceedings right from the start, such as the scope of discovery and permitted defenses or counter-claims. To create further difficulties, the circuit courts would likely be forced to certify and decide conflicts among those districts, which would lead to even more inconsistent outcomes.

While that scenario is hypothetical, the inconsistent tests established by lower courts were one of the very real problems that the Supreme Court sought to avoid by establishing the *Jaffee* balancing test. The Court articulated their goal by saying that the unpredictable scope of protection resulting from such a variety of legal balancing tests would "eviscerate the effectiveness of the

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[83] *Id.*

[84] *Id.*

privilege" entirely.[85] By refusing to allow the lower courts to establish their own balancing tests for privileges, the Supreme Court manifested their interest in promoting the predictability of a privilege's protection. The Supreme Court advocated for predictability, not balancing tests. However, the Court proceeded to contradict their strong initial interest in predictability by using the *Jaffee* case to establish a balancing test for privileges.

This paradox reflects the Supreme Court's view that lower courts should not use any arbitrary method of their choosing, but instead should use only the *Jaffee* balancing test to recognize new privileges.[86] This interpretation promotes the Court's strong interest in predictability because the same balancing test is consistently used to enact privileges. It also promotes the Court's interest in remaining consistent with Congress's intent for a flexible rule, because courts should evolve as society changes and weigh the factors "in light of reason and experience" as required by Rule 501.[87] In the context of a mediation privilege, the same unpredictability exists among the federal courts and extends negative effects onto the state level. The federal courts' refusal to recognize a mediation privilege is frustrating the rapidly increasing consistency among state courts.

In sum, federal courts should weigh the first two factors against the third factor and easily find that the left side of the scales far outweighs the right side, and therefore a privilege should be recognized. Because the courts should conclude that a mediation privilege overcomes the necessary "burden," no inquiry into the fourth factor is necessary. For the sake of reinforcing the Court's original goal of vertical and horizontal predictability as it applies to a federal mediation privilege, courts should account for the fourth factor and determine that a privilege should not be denied.

IV. CURRENT UNPREDICTABLE INCONSISTENCIES AMONG FEDERAL COURTS WHEN RECOGNIZING OR DENYING PRIVILEGES SIMILAR TO A MEDIATION PRIVILEGE

A chronological analysis of cases that followed *Jaffee* shows the extent of the inconsistent approaches to a federal mediation privilege. Although federal courts generally agree that confidentiality is essential to successful

[85] *Id.* The Seventh Circuit previously used a balancing test in the lower *Jaffee* decision.

[86] *Id.*

[87] Congress borrowed this phrase from a 1934 Supreme Court opinion, Wolfle v. United States, 291 U.S. 7, 12 (1934).

settlements,[88] the interest in ensuring accurate judicial fact-finding often outweighs the public and private interests in reaching settlements. The various applications of the *Jaffee* balancing test to settlement discussions show the different weight that different federal courts give to each factor.

A. *Federal Courts That Have Successfully Used the* Jaffee *Balancing Test to Recognize a Mediation Privilege or Other Similar Protection*

The Ninth Circuit was one of the first federal courts to protect mediation communications, even though the court did not specifically define the protection as an evidentiary "privilege."[89] In *NLRB v. Joseph Macaluso, Inc.*, the court recognized that the public perception of mediator neutrality would be destroyed if mediator testimony were admissible in subsequent court proceedings.[90] This would undermine the whole mediation process, therefore such testimony should be inadmissible.[91] The Ninth Circuit concluded that the protection promoted the public interest—"maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable"[92] from permitting the mediator testimony, which is parallel to the interest promoted by the second *Jaffee* factor.[93] At least two other courts have

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[88] Judy Shopp, *Mediation: Confidentiality and Privilege,* Penn. Bar Association Quarterly, July 2010, available at http://www.ogc.pa.gov/Services%20to%20Agencies/Mediation%20Procedures/Documents/PABAR%20Shopp%20New%20Cx%20Article.pdf ("Most courts are understanding of the mediation process and respectful of the need to keep the process confidential, and by and large mediators and the programs and organizations that support mediation have been successful at keeping mediators out of court proceedings, especially within the Third Circuit.").

[89] NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 52-53 (9th Cir. 1980). *See also* Lake Utopia Paper Limited v. Connelly Containers, Inc., 608 F.2d 928 (C.A.N.Y. 1979), in which the court discussed the need for confidentiality in different ADR procedures, reasoning that a pre-trial conference was somewhat regarded as confidential.

[90] *NLRB*, 618 F.2d at 52-53.

[91] *Id.* at 55. ("If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the [FMCS] in the settlement of future disputes would be seriously impaired, if not destroyed.").

[92] *Id.* at 54.

[93] *Id.* Ironically, the Ninth Circuit does not reference the *Macaluso* opinion and does not cite to *Jaffee* at all.

extended the *Macaluso* holding to unambiguously result in the definition of a federal mediation privilege.[94]

Almost twenty years after the Ninth Circuit issued the *Macaluso* decision, Congress enacted the Alternative Dispute Resolution Act of 1998 (the "ADR Act") to govern federal mediations.[95] The ADR Act instructed the federal district courts to create alternative dispute resolution procedures for all civil court proceedings.[96] This instruction included a requirement that the courts create and implement some procedure for mediation confidentiality.[97] Seemingly a step towards confidentiality uniformity, the overwhelming majority of courts have interpreted the ADR Act only to be a broad instruction to address mediation confidentiality in some form and not as a specific instruction to implement a privilege.[98] These courts reason that Congress rejected the nine specific privileges originally proposed and therefore did not intend for the ADR Act to explicitly create any ADR privilege.[99] Despite this interpretation, the ADR Act successfully manifested Congress's view that confidentiality is essential to the success of mediation and that mediation communications ought to be protected, to some extent, from future disclosures.[100] The ADR Act also provided congressional recognition that mediation is an increasingly popular dispute resolution method requiring recognized and predictable confidentiality.[101] This provides additional support

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[94] City of Port Arthur v. United States, 517 F. Supp. 987, 1002-03 & n.105 (D.D.C. 1981), judgment aff'd, 459 U.S. 159 (1982) (the court cited the *Macaluso* holding when permitting the mediator to refuse to testify). *See also* Mack Truck v. United Auto Workers, Misc. Action No. 87-265 (D.D.C. Aug 11, 1987) (the court cited the public need for the assurance of confidentiality was more important than the parties' need for the mediator testimony, but the mediator was permitted to testify about statements made to the public).

[95] Alternative Dispute Resolution Act, 28 U.S.C. § 651–58 (1998). Although the Administrative Dispute Resolution Act of 1996 (ADRA) provides an explicit federal mediation privilege when a federal agency is a party.

[96] *Id.*

[97] *Id.* It only instructed the courts to "provide for confidentiality of the alternative dispute resolution process and to prohibit disclosure of confidential dispute resolution communications." 28 U.S.C. § 652(d).

[98] *See* Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1123 (N.D. Cal. 1999) (finding that because Congress had previously played a major role in the language of Federal Rule of Evidence 501, they most likely did not also intend to create a specific mediation privilege by enacting the specific confidentiality portions of the Alternative Dispute Resolution Act).

[99] *Id.* Those courts turn to 28 U.S.C. § 652(d), which states that the ADR Act does not define confidentiality or the scope that Congress intended for mediation confidentiality.

[100] Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91 (1999-2000).

[101] *Id.*

for the federal courts' use of the *Jaffee* balancing test to enact a federal mediation privilege.

Over twenty years after the Ninth Circuit recognized the protection in *Macaluso*, the Sixth Circuit recognized a protection for mediation communications, although the mechanism used was Federal Rule of Evidence 408, not Rule 501.[102] In *Goodyear Tire & Rubber Co. v. Chiles Power Supply*,[103] the court did not explicitly address a mediation privilege, but instead used Federal Rule of Evidence 408 and adopted an expansive privilege for settlements using the same reasoning from *Jaffee*.[104] The *Goodyear* decision illustrates the strong weight that should be given to the public's interest in limiting additional unnecessary litigation. It also illustrated the lack of weight given to the interest in judicial truth-seeking, as the court remained relatively unconcerned about the risk of excluding any otherwise admissible evidence.[105] The Sixth Circuit's interpretation of these two competing interests shows how federal courts can also balance these interests in favor of a federal mediation privilege under Rule 501.

Following Rule 501 instead of the Sixth Circuit's path under Rule 408, federal courts in both California and Pennsylvania successfully used the *Jaffee* balancing test to expand the protection afforded to mediator testimony, which was previously defined by *Macaluso*.[106] Both courts extended the protection by defining a mediation privilege that also applies to participants.[107]

In *Folb v. Motion Pictures Industry Pension & Health Plans*, the Ninth Circuit revisited the issue they had previously decided and recognized a federal mediation privilege, separate from any similar state privilege, by blocking the discovery of documents previously prepared for a mediation between two employees, one of which had been accused of sexual harassment.[108] The court cited its previous decision in *Macaluso* and concluded that the interest in blocking mediator testimony and the interest in

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[102] Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 979 (6th Cir. 2003).

[103] *Id.* at 979-80 (stating that this privilege included those communications regarding the settlement itself, which prevented them from being admitted into evidence).

[104] *Id.*

[105] *Id.* (stating that although this could be because the parties reached a settlement regarding the communications in question, such a loss of evidence may not have been important).

[106] *Folb*, 16 F. Supp. 2d at 1178; Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511, 514 (W.D. Pa. 2000).

[107] *Folb*, 16 F. Supp. 2d at 1178; *Sheldone*, 104 F. Supp. 2d at 514.

[108] *Folb*, 16 F. Supp. 2d at 1178 (noting that, with regard to the criminal nature of the accusations, the privilege "may be attenuated of necessity in criminal or quasi-criminal cases where the defendant's constitutional rights are at stake").

keeping mediation communications confidential serve the "same ultimate purpose: encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution."[109] The court used the *Jaffee* balancing test to establish this mediation privilege, even though they left the parameters of the privilege relatively undefined.[110] By leaving the parameters of the privilege undefined, the *Folb* court side-stepped the issue of the applicability of the privilege to future mediations and their unique factual settings. Therefore, although the court expanded the privilege, the uncertain applicability is still problematic for promoting predictability.

The Western District of Pennsylvania followed the Ninth Circuit's reasoning and expanded the *Folb* privilege.[111] In *Sheldone v. Pennsylvania Turnpike Commission*, the court recognized a privilege for mediation communications and documents in a Fair Labor Standards Act case, by meticulously analyzing each *Jaffee* factor, just as previously done by the *Folb* court.[112] First, the court cited the ADR Act of 1998 as overwhelming evidence that a mediation privilege was essential to promote settlements through the establishment of a trusting environment.[113] Second, the court recognized that a mediation privilege serves the public's interest in promoting settlements to decrease court dockets and costs.[114] Third, the court determined that any evidence lost would not exceed a "modest" amount, reasoning that the opposing party's burden to discover information without using the privileged mediation communications was not unreasonable.[115] Finally, the court explicitly stated that the federal court's failure to adopt the privilege would

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[109] *Id.* at 1172. *See also* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 56 (9th Cir. 1980).

[110] *Folb*, 16 F. Supp. 2d. at 1179-80 (Stating the mediation privilege parameters must be "fleshed out over time" and that it would not consider waiver and exception issues. However, the court did define "mediation" because of the timeline of when the statements were made in relation to the actual mediation. The Ninth Circuit established that the privilege protected communications between parties or with the mediator that were made during or in preparation for a formal mediation session. Additionally, the *Folb* court did not want to venture into FRE 408 territory, reasoning that all communications after the mediation session were not privileged under their established mediation privilege). *See also* Deason, *supra* note 3 at 97-100 (discussing the problems associated with the ambiguously defined privilege).

[111] *Sheldone*, 104 F. Supp. 2d at 515-16. *See also* Deason, *supra* note 3 at 37, (stating that the coverage for communications "in connection with" a mediation is potentially broader than that of the *Folb* privilege, in that it might include communications following the close of a mediation session).

[112] *Sheldone*, 104 F. Supp. 2d at 512-18.

[113] *Id.* at 513-14.

[114] *Id.* at 514.

[115] *Id.* at 515.

undermine the states' consistency.[116] At least one other court has cited *Sheldone* extensively to recognize a federal mediation privilege,[117] while also adding to the public interest by emphasizing the importance in encouraging alternative dispute resolution processes to promote more efficient litigation.[118]

The Ninth Circuit's decisions in *Macaluso* and then in *Folb* established protections for mediation communications by using a balancing test similar to *Jaffee*. Although neither of those decisions, nor the *Sheldone* decision, were adopted uniformly, they began the important discussion about a predictable federal mediation privilege, separate from state mediation privileges. All federal courts should follow the foundation established by those decisions and use the *Jaffee* balancing test to recognize a federal common law mediation privilege under Rule 501. The federal courts that have rigidly refused to recognize a federal common law mediation privilege rely on reasoning which contradicts *Jaffee* and the congressional intent accompanying Rule 501. Therefore, when determining whether to recognize a mediation privilege, federal courts should use their "reason and experience" to avoid similar contradictory decisions that result in unpredictable protections.

B. *Federal Courts That Have Refused to Recognize a Mediation Privilege or Have Avoided Deciding the Issue of a Mediation Privilege*

Some federal courts refuse to recognize a federal common law mediation privilege under Rule 501, while others simply avoid addressing the issue entirely.[119] The problems caused by this additional divide among the federal courts is exemplified by returning to the Central District of California, the court that originally decided *Folb*.[120] In *Molina v. Lexmark International, Inc.*,

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[116] *Id.* at 515-18 (stating that all of the states except Delaware had a mediation confidentiality statute).

[117] *In re* RDM Sports Grp., Inc., 277 B.R. 415, 431 (Bankr. N.D. Ga. 2002) (stating that documents prepared in advance of the mediation but not specifically for the purpose of the mediation did not qualify for the privilege).

[118] *Id.* at 427-28.

[119] *See generally* Solorzano v. Shell Chem. Co., No. CIV.A.99-2831, 2000 WL 1145766 (E.D. La. Aug. 14, 2000) (Holding that no federal privilege existed to protect an ombudsman's records. Both the Louisiana district court and the Eighth Circuit decision which it relied on acknowledged the strong presumption against creating federal privileges, and both courts concluded that it was not overcome in either case, while also concluding that no evidence existed showing that a lack of a privilege would hinder the ombudsman's ability to solve workplace disputes or his coworker's perception of his neutrality.).

[120] *See generally* Molina v. Lexmark Int'l, Inc., No. CV08-04796 MMM (FMx), 2008 WL 4447678 (C.D. Cal. Sept. 30, 2008).

the court scrutinized their previous establishment of a mediation privilege, by stating that the *Folb* holding must be limited to its facts.[121] This limited application of the privilege frustrates any predictability that it otherwise may have established. The *Molina* court then questioned the existence of a federal common law mediation privilege by making the distinction that mediation communications are "confidential" but are not "privileged" under either Rule 501 or Federal Rule of Evidence 408.[122] This vague stance is unhelpful in establishing the privilege's parameters, which were already ambiguous from the *Folb* decision. In order to achieve any amount of predictability, federal courts must establish clear parameters for a common law federal mediation privilege.

The Fifth Circuit took an even more rigid stance in denying a mediation privilege in *In re Grand Jury Subpoena.*[123] The court refused to recognize a federal common law privilege for mediation communications, despite the general acceptance of confidentiality's important role in the success of mediation, reasoning that privileges should only be created when there is clear congressional manifestation of intent to create such a privilege.[124] This reasoning is inconsistent with the enactment of Rule 501 because Congress chose to defer to the courts' "reason and experience" for recognizing privileges, they eliminated any requirement of their specific intent for enacting such privileges.[125] The closest thing to congressional intent to explicitly create a mediation privilege is the enactment of the ADR Act, in which courts are only required to address mediation confidentiality in some form. The Fifth Circuit does not use any reason or experience when denying the mediation privilege, but instead creates a confusing precedent that would likely be overturned if it reached the Supreme Court. Therefore, federal courts should not follow this reasoning and should instead return to the cases previously addressed to find justification and the foundation for recognizing a federal mediation privilege.

Other federal courts have refused to address the issue of whether a federal common law mediation privilege exists under Rule 501.[126] For example, the

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[121] *Id.* at *13.

[122] *Id.* at *9-11.

[123] *See generally In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487 (5th Cir. 1998).

[124] *Id.* at 492.

[125] Notes of Committee on the Judiciary, *supra* note 8, at 7.

[126] Babsasa v. LensCrafters, Inc., 498 F. 3d 972, 972 (9th Cir. 2007). The general issue was whether a letter that was prepared for a mediation, and therefore protected by California's rules of evidence, was admissible for the purpose of determining removal jurisdiction.

Ninth Circuit that previously established the *Folb* privilege once again refused to decide the issue in a more recent case.[127] In *Babsasa v. LensCrafters, Inc.*, the court avoided the issue of federal mediation confidentiality by narrowly concluding that it was irrelevant whether a state privilege applied, because amount-in-controversy issues are governed by federal law.[128] Therefore, under Rule 501, the applicability of a California mediation privilege was irrelevant.[129] Interestingly, the Ninth Circuit stated in a footnote that *LensCrafters* failed to raise the argument that the letter was privileged under federal law or a common law privilege.[130] Because *LensCrafters* was likely unaware of the extent of the previously established privilege from *Folb*, they failed to raise an issue that may otherwise have been successful, so the Court refused to consider it.[131] This provides further evidence that the inconsistencies among any recognized federal mediation privileges cause unpredictability for litigants that must be corrected.

Federal courts have generally exercised restraint when considering new common law privileges in all contexts, citing the Supreme Court's conclusion that privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[132] However, federal courts should return to the congressional intent accompanying Rule 501, which established that privileges should evolve alongside society. Congress did not issue mandates regarding specific privileges, but instead intended for courts to make determinations "in the light of reason and experience."[133] Therefore, the federal courts should view the evidence of society's increasing interest in the success of mediation as a signal that the time has come to recognize a federal mediation privilege.

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[127] *Id.* at 972.

[128] *Id.* at 972.

[129] *Id.* at 975 ("Thus, even if the California mediation privilege applied to the Bruinsma letter, which we do not decide, it would not preclude a determination that the Bruinsma letter constituted §1446(b) notice for purposes of removal to federal court.")

[130] *Id.* at 975 n.1.

[131] *Id.* at 975.

[132] Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

[133] *See* Jaffee v. Redmond, 518 U.S. 1, 2 (1996).

V. PROPOSAL FOR PROMOTING PREDICTABILITY USING THE *JAFFEE* BALANCING TEST AND THE POSITIVE EFFECT ON THE SUCCESS OF MEDIATION

The unpredictability caused by the federal courts' inconsistent approaches to a federal mediation privilege jeopardizes the ability of mediation to be a successful dispute resolution method. Predictability is essential to a successful privilege, but the current federal approach does nothing to promote it at the federal or state level. The Supreme Court affirmed the importance of predictability among the state and federal courts in *Jaffee* by saying that "[parties] must be able to predict with some degree of certainly whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[134] Although complete predictability is unrealistic, federal courts must begin to take steps towards some level of uniformity.

The uncertainty of the federal mediation privilege causes a variety of applications among the lower courts, which is hardly better than no privilege at all. The unpredictable federal mediation confidentiality also frustrates the benefit of the growing uniformity at the state level.[135] Mediation participants cannot confidently predict the extent to which their statements will be protected if their dispute moves between the state and federal levels, so any state uniformity is useless.[136] Parties that are not sure about the extent of confidentiality for their statements will not negotiate in good faith or make full disclosures, which makes a settlement nearly impossible.[137] When mediation does not promote settlements, it undermines the private and public interests served by mediation.[138]

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[134] *Id.* at 18.

[135] *Uniform Law Commission* (2016), http://uniformlaws.org/Act.aspx?title=Mediation%20Act.

[136] Uncertainty exists in litigation, regardless of the area of law, causing some difficulty in predicting the law that will govern litigation after mediation. This normal uncertainty increases with the lack of consistent state and federal privileges. Deason, *supra* note 3, at 280 (describing these uncertainties involve three basic layers: the variety of confidentiality protections, the variety in choice-of-law analysis, and the competing and multiple interests at stake in the specific litigation).

[137] *See generally* FISHER & URY, *supra* note 4.

[138] *See generally* Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001).

Notably, the Supreme Court has turned to state law in determining the existence of privileges more than any other area of evidence law.[139] This shows the persuasiveness of the states' recognition of privileges on the federal courts, both in substance and the need for predictability.[140] When adopting a federal mediation privilege, the federal courts should look the states' adoption of the UMA and follow their exceptions to the privilege.[141] This would further promote predictability and mediation participants could accurately predict the extent of confidentiality and the applicable exceptions. It is an unrealistic goal to expect that federal courts will ever unanimously adopt the Uniform Mediation Act, but this does not mean some amount of uniformity cannot be achieved.

One problem presented by the above cases is the inapplicability of an established and recognized privilege to different facts, because of the narrow holdings. As mediation continues to expand across jurisdictions, the need increases for a privilege that is applicable to different situations.[142] The Ninth Circuit in *Folb* established a broad privilege, but then later determined that it only applied to the specific facts of that case. This holding is unhelpful for any future litigants seeking to persuade a federal court to recognize a mediation privilege because of its inapplicability to other factual settings. Multiple courts have established that a privilege exists under the specific case facts, but they fail to define the parameters that could potentially apply to other situations. This leaves future courts without an established and applicable privilege and leaves the private parties unable to predict how their statements are protected. Federal courts should use their "reason and experience" along with the *Jaffee* factors as applied to similar situations to establish clear parameters of a mediation privilege under Rule 501.

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[139] PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 575-78 (2009).

[140] Fred Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 77 (1999).

[141] Uniform Mediation Act §6(a)(1)-(7) provides the exceptions to the privilege. *See, e.g.*, Ohio R.C. § 2710.05(B)(1). (Section language states "There is no privilege under section 2710.03 of the Revised Code if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that the disclosure is necessary in the particular case to prevent a manifest injustice, and that the mediation communication is sought or offered in either of the following: (1) A court proceeding involving a misdemeanor...")

[142] Uniform Mediation Act, Prefatory Note (2001) ("Mediation sessions are increasingly conducted by conference calls between mediators and parties in different states and even over the Internet.").

VI. CONCLUSION

The various inconsistent approaches to federal common law privileges are undermining the ability of mediation to grow as a successful method of alternative dispute resolution. The resulting unpredictability is the exact problem the Supreme Court corrected in *Jaffee v. Redmond* by enacting a balancing test for courts to use with their "reason and experience" when recognizing new privileges.[143]

Jaffee applied a balancing test to recognize a psychotherapist-patient privilege and held that a privilege would not be recognized if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests."[144] If the first *Jaffee* factors, which require the privilege to benefit a private and public interest, sufficiently outweigh the third factor,[145] the court should recognize the privilege. If the first two factors do not sufficiently outweigh the third factor, then the court should proceed to consider the fourth factor before determining that the privilege should be denied.

In the context of a mediation privilege, the federal courts should give weight to the first two factors that exceedingly outweighs the third factor. A mediation privilege would likely cause only a minimal loss of evidence, because the information sought could be independently discoverable.[146] The fourth *Jaffee* factor that represents the procedural interest in predictability also provides justification for a federal mediation privilege.[147] No analysis of the fourth factor is necessary at that point because courts should not be considering denying the privilege. The fourth factor only strengthens the reasons to recognize a mediation privilege because many state legislatures, recognizing

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[143] *See* Jaffee v. Redmond, 518 U.S. 1, 2 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 47, 100 S.Ct. 906 (1980) (Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges").

[144] *Id.* The *Jaffee* Court's paradoxical stance about balancing tests should not interpreted to mean that the Court disfavors using the balancing test to recognize new privileges, but instead should be interpreted as a manifestation of Congress's intention for Rule 501 to be flexible and evolving along with society.

[145] *Id.*

[146] Widman, *supra* note 56.

[147] *See Jaffee*, 518 U.S. 1 at 2.

the important role of confidentiality in mediation, have moved towards consistency by adopting the mediation privilege contained in the UMA.[148]

The UMA itself provides support for enacting a privilege, because it was created for the very purpose of establishing consistency and creating public confidence in the use of voluntary mediation.[149] Despite this clear direction and applicability of the *Jaffee* balancing test to a federal mediation privilege, federal courts have not consistently recognized a federal common law mediation privilege under Rule 501, thus undermining each one of the interests promoted by *Jaffee*. The federal courts should correct this damaging trend by using their "reason and experience"[150] to balance the four *Jaffee* factors and make progress towards uniformly recognizing a federal mediation privilege under Rule 501.

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[148] Kimberly Taylor, Mediation: Confidentiality and Enforceability, LAW.COM (Apr. 6, 2015), http://www.law.com/sites/kimberlytaylor/2015/04/06/mediation-confidentiality-and-enforceability/?slreturn=20170119165737.

As of 2015, twelve states have enacted the UMA, and two more plan to introduce a similar Bill this year.

[149] *Id.* (Saying that the UMA "will further the goals of alternative dispute resolution by promoting candor of the parties by fostering prompt, economical, and amicable resolution of disputes, by retaining decision making authority with the parties, and by promoting predictability with regard to the process and the level of confidentiality that can be expected by participants.").

[150] Fed. R. Evid. 501.